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HARVARD LAW REVIEW

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## IN MEMORIAM: JUSTICE ANTONIN SCALIA

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Antonin Scalia.

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*Chief Justice John G. Roberts, Jr.\**

Five hundred years ago, Saint Thomas More published an account of an imaginary insular society that had achieved peace, tranquility, and prosperity. In More's Utopia, individuals lived orderly, regimented lives in mutual support of the public good, creating a commonwealth so advanced that it tolerated no lawyers.

Antonin Scalia admired Thomas More, and they shared many attributes. Both were legal scholars of deep faith, incisive intelligence, and iron conviction. When the Justice sat for his portrait now on display at the Supreme Court, he requested that the artist include More's image within the frame. But Justice Scalia, perhaps like More himself, would have fled Utopia in a heartbeat. He would have balked at the Utopian demands for conformity, and he would have quickly reckoned that Utopia had little use for his foremost talents.

The Antonin Scalia whom I knew — as an advocate trying to respond to his exacting questions and as a colleague by his side on the bench — was a man of lively passions, mirthful humor, abounding loyalty, and generosity of spirit. He thrived on the vibrant clash of ideas and took no offense from the din of divergent views. He was unpretentiously devoted to the joys of his large family and his many friends. He was equally at ease donning a judicial robe and engaging in vigorous colloquy or sporting hip waders and casting dry flies. And, unlike the Utopians, he was not very fond of fools.

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\* Chief Justice of the United States. The references to Utopian customs and practices are drawn from THOMAS MORE, *UTOPIA* 135–137, 171, 193, 195–197 (George M. Logan et al. eds., Robert M. Adams trans., Cambridge Univ. Press 2006) (1516).

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Antonin Scalia would likely have found life in Utopia unfulfilling — and not just because the Utopians banned hunting. In More’s Utopia, the laws were few, they were simply framed to instruct citizens on their duties, and they were both unambiguous and free from controversy. In Utopia, Antonin Scalia’s greatest gift — his judicial acumen — would have gone to waste.

Our American democracy is no legal Utopia. Our laws are many; they are often complex and produce stormy debate. When disputes arise, our citizens must look to the courts to discern and apply the rules without fear or favor. Throughout his thirty-four years on the bench, Justice Scalia brought matchless vision, skill, and wisdom to the task of judging. His insistence on fidelity to legal texts brought discipline and precision to our craft. His unwavering commitment to our Constitution and democratic principles fostered justice and sustained liberty. His trove of opinions — concise, discerning, thoughtful, witty — stand together as an enduring model of the judicial art.

Antonin Scalia has earned the gratitude of the American people for his long service to the country he loved. When his body rested in repose in the Great Hall of the Supreme Court, thousands of fellow citizens from all walks of life stood in line, many waiting over an hour in the cold of a February night, for the opportunity to pay their respects for perhaps a minute. Although most did not know him, all knew that greatness had passed.

Antonin Scalia was our man for all seasons; he will be recognized by future generations as a farsighted jurist for our imperfect times.

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*Justice Ruth Bader Ginsburg\**

The script of John Strand’s play, *The Originalist*, opens with two quotations:

- 1) “[The] Fixed-Meaning Canon: Words must be given the meaning they had when the [legal] text was adopted.”
- 2) “Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea . . . .”<sup>1</sup>

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\* Associate Justice, Supreme Court of the United States.

<sup>1</sup> JOHN STRAND, *THE ORIGINALIST* (2015).

The first quotation is attributed to Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*;<sup>2</sup> the second, to Chief Justice John Marshall.<sup>3</sup> Justice Scalia would no doubt stand by the words he and coauthor Garner wrote. My view accords with the great Chief Justice's, and I believe Justice Scalia would agree that Marshall had a point. I leave to others discussion of Justice Scalia's provocative jurisprudence and will speak here, instead, of our enduring friendship, from the years we served together on the U.S. Court of Appeals for the D.C. Circuit, through the nearly twenty-three years we were two of nine Justices on the U.S. Supreme Court.

In a preface to the libretto for Derrick Wang's comic opera *Scalia/Ginsburg*,<sup>4</sup> Justice Scalia described as a high point of his days on the bench a spring 2002 evening at the Opera Ball, held at the British Ambassador's Residence. In an elegant and spacious room with good acoustics, Justice Scalia joined two regular Washington National Opera tenors at the piano for a medley of songs. He called it the famous Three Tenors performance. He was, both on and off the bench, a convivial, exuberant performer. It was my great good fortune to have known him as a constantly stimulating working colleague and cherished friend.

Among my store of memories, an early June morning, 1996. I was about to leave the Court to attend the Second Circuit's Judicial Conference at Lake George. Justice Scalia entered my space in chambers, opinion draft in hand. Tossing a sheaf of pages onto my desk, he said: "Ruth, this is the penultimate draft of my dissent in the Virginia Military Institute case.<sup>5</sup> It's not yet in shape to circulate to the Court, but the clock is running and I want to give you as much time as I can to answer it."

On the plane to Albany, I read the dissent. It was a zinger, taking me to task on things large and small. Among the disdainful footnotes: "The Court . . . [refers] to 'the Charlottesville campus' of the University of Virginia. . . . Unlike university systems with which the Court is perhaps more familiar, such as those in New York . . . , there is only *one* University of Virginia."<sup>6</sup> Thinking about fittingly restrained responses consumed my weekend, but I was glad to have the extra days

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<sup>2</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78 (2012).

<sup>3</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819).

<sup>4</sup> The entire libretto appears in Derrick Wang, *Libretto: Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions with Prefaces by Justices Ruth Bader Ginsburg and Antonin Scalia*, 38 COLUM. J.L. & ARTS 237 (2015).

<sup>5</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>6</sup> *Id.* at 584 n.4 (Scalia, J., dissenting).

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to adjust the Court's opinion. My final draft was more persuasive thanks to Justice Scalia's searing criticism.

Indeed, whenever I wrote for the Court and received a Scalia dissent, the majority opinion ultimately released was clearer and more convincing than my initial circulation. Justice Scalia homed in on the soft spots and energized me to strengthen the Court's decision.

Another indelible memory, the day the Court decided *Bush v. Gore*,<sup>7</sup> December 12, 2000. I was in chambers, exhausted after the marathon: review granted Saturday, briefs filed Sunday, oral argument Monday, opinions completed and released Tuesday. No surprise, Justice Scalia and I were on opposite sides. The Court did the right thing, he had no doubt. I strongly disagreed and explained why in a dissenting opinion.<sup>8</sup> Around 9:00 p.m. on Tuesday, the telephone, my direct line, rang. It was Justice Scalia. He didn't say "get over it." Instead, he asked, "Ruth, why are you still at the Court? Go home and take a hot bath." Good advice I promptly followed.

Among my favorite Scalia stories, when President Clinton was mulling over his first nomination to the Supreme Court, Justice Scalia was asked a question to this effect: if you were stranded on a desert island with your new Court colleague, who would you prefer, Larry Tribe or Mario Cuomo?<sup>9</sup> Scalia answered quickly and distinctly: "Ruth Bader Ginsburg." Within days, the President chose me.

I recall, too, a dark day for me, confined in a hospital in Heraklion, Crete, in the summer of 1999, the beginning of my long bout with colorectal cancer. What brought me to Crete? Justice Scalia's recommendation that I follow him as a teacher in Tulane Law School's summer program there. The first outside call I received was from Justice Scalia. "Ruth," he said, "I am responsible for your days in Crete, so you must get well, and is there anything I can do to help?"

Justice Scalia was a man of many talents, a jurist of captivating brilliance, high spirits, and quick wit, possessed of a rare talent for making even the most somber judge smile. The press wrote of his "energetic fervor," "astringent intellect," "peppery prose," "acumen," and "affability."

Not so well known, he was a discerning shopper. When we were in Agra together in 1994 for a judicial exchange with members of India's Supreme Court, our driver took us to his friend's carpet shop. One rug after another was tossed onto the floor, leaving me without a clue which to choose. Justice Scalia pointed to one he thought his wife

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<sup>7</sup> 531 U.S. 98 (2000).

<sup>8</sup> *Id.* at 135 (Ginsburg, J., dissenting).

<sup>9</sup> See *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 227 (1993) (statement of Sen. Herbert H. Kohl).

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Maureen would like for their beach house in North Carolina. I picked the same design, in a different color. It has worn very well.

Once asked how we could be friends, given our disagreement on lots of things, Justice Scalia answered: “I attack ideas. I don’t attack people. . . . [S]ome very good people have some very bad ideas . . . . And if you can’t separate the two, you gotta get another day job. You don’t want to be a judge. At least not a judge on a multi-member panel.”<sup>10</sup> Example in point, from his first days on the Court, Justice Scalia had great affection for Justice Brennan, as Justice Brennan was drawn to him.

I miss the challenges and the laughter Justice Scalia provoked, his pungent, eminently quotable opinions, so clearly stated that his words rarely slipped from the reader’s grasp, the roses he brought me on my birthday, the chance to appear with him once more as supernumeraries at the Washington National Opera. The Court is a paler place without him.

Toward the end of the opera *Scalia/Ginsburg*, tenor Scalia and soprano Ginsburg sing a duet: “We are different. We are one.”<sup>11</sup> Yes, different in our interpretation of written texts, but one in our respect and affection for each other and, above all, our reverence for the Constitution and the Court.

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*Justice Elena Kagan\**

In September 2009, I stepped up to the lawyers’ podium at the Supreme Court for the first time. The case I was arguing (*Citizens United*) was important, and I had never addressed an appellate court before. I was nervous; truly, I could hear almost nothing above the pounding of my heart. I stammered out a couple of memorized and fairly anodyne sentences about the history of campaign finance regulation in the country, when Justice Antonin Scalia leaned over the bench, in a way that would soon become familiar, and admonished me to “wait, wait, wait, wait.” (Until a reporter recently corrected me, I had thought Justice Scalia said “no, no, no, no.” The transcript says otherwise, but I still think he might just as well have.) He then went on

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<sup>10</sup> *60 Minutes: Justice Scalia on the Record* (CBS television broadcast Apr. 27, 2008), <http://www.cbsnews.com/news/justice-scalia-on-the-record> [<https://perma.cc/B5XS-AVQH>].

<sup>11</sup> Wang, *supra* note 4, at 280–82.

\* Associate Justice, Supreme Court of the United States.

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to say that “I don’t understand what you are saying” — and that to the extent he did grasp the point, “it proves nothing whatever.” The challenge Justice Scalia put to me that day wasn’t for the lily-livered, but then nothing about him ever was. He believed in mixing it up — in the clash of arguments and ideas; he relished intellectual exchange, even as it approached a form of combat. And on that day of my first argument, he did me (I suspect knowingly) an enormous favor: By immediately taking the fight to me, he compelled me to step up — to get over my nerves, to offer an answer as confident and forceful as his question, and to continue in a similar vein throughout the argument. If I could have, I would have thanked him later.

Throughout my time as Solicitor General, I loved arguing to Justice Scalia — even if it meant occasionally being his piñata. He appeared sometimes to agree, sometimes to disagree with the side I was taking. When the former, I appreciated the help he gave: Many in the Supreme Court bar know the feeling of stumbling through an answer, only to hear what one should have said — what one *obviously* should have said, now that one hears it — coming out of Justice Scalia’s mouth. And when the latter, I enjoyed the point-counterpoint (nearly?) as much as he so clearly did. His questions could be aggressive, but they were always straightforward: He was trying not to trick me or trip me up, but simply to confront me with what he thought the fundamental weaknesses of my position. I liked that he invariably got right to the heart of the matter — the things I had spent the most time worrying about. I liked that after he did so, he let me give a full answer — and that he listened to what I then said. I liked that, as in the *Citizens United* argument, he made me up my game, to try to meet the analytic force of his interrogative challenges. Once, when Justice Scalia was asking me a series of hard questions, I asked him one back. Don’t try that at home: The Chief Justice rightly reminded me that I had overstepped my role, that lawyers don’t get to put Supreme Court Justices on the spot. But as I think back on the incident, it occurs to me that I would have thought to do that only with Justice Scalia: Everything about him invited debate and engagement. Had the Chief Justice not stepped in, I’m pretty sure Justice Scalia would have answered my query, just to keep our discussion going until he had thought through the matter as fully as possible.

Even before my year as SG, I had come to know and admire Justice Scalia. He was a fiercely loyal alumnus of Harvard Law School. (In inspiring that devotion, HLS was hardly alone: Loyalty in all things ranked high among Justice Scalia’s long list of virtues.) When I was dean, he celebrated his 20th anniversary on the Court, and I had the pleasure of hosting a dinner to mark the occasion. It was a great evening: Most of Justice Scalia’s Harvard-educated clerks attended, and they and several faculty members toasted and roasted him, attested to the enormous importance of his tenure, and dispensed both

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praise and criticism of his opinions. I was struck that night by the love Justice Scalia had for his former clerks, their appreciation of him returned in fully equal measure. And I marveled at the Justice's desire to make the event, as far as he could, about substance — to transform even what was meant to be a party into an exploration of ideas and an opportunity for learning.

On that occasion and so many others, when he visited and revisited law schools across the country, Justice Scalia revealed his enthusiasm — no, his passion — for connecting with law students. But in fact, Justice Scalia didn't really need to visit; he could make that connection solely through his written opinions. He used to say that students were one of his target audiences and, if my hours teaching administrative law are in any way typical, he had an unerring instinct for what would persuade them or, at the very least, make them think harder. Justice Scalia's opinions mesmerize law students. And why should they not? The captivating style, full of wit, dash, and verve. (As a sheer writer, I think, Justice Scalia belongs in the company of Justices Holmes, Brandeis, and Jackson.) The analytic rigor and precision, the insistence upon logic and discipline in legal reasoning. The ability to convey ideas in the way that will make them most stick with the reader. The very presence of ideas — deep, thought-provoking understandings of the way law should work. If I heard it once from a student, I heard it a thousand times: "Professor Kagan, I didn't think I would ever agree with Justice Scalia, but he just has to be right about this." And so he was, often. And so law students in generations to come will tell their professors.

As all this suggests, by the time I got to the Court, I was already a fan. But even so, I'm not sure I suspected how much, and why, I would love being Nino's colleague. For one thing, Nino listened hard — and with his mind open — to other Justices' arguments. Not, of course, on every issue. Nino by then had been a judge for some 25 years; he knew what he thought about a lot of things. But even as he expressed his own views at conference (with all the intelligence and energy one might expect), no one attended more carefully to others' perspectives. And with surprising frequency, he would declare himself persuaded by something he heard around the table, and modify his vote accordingly. (Sorry, but I won't name the cases!) Or perhaps that is really not so surprising. Because Nino wanted, above all else, to get each case right — and to do so by working through it with as much discipline and care and disinterestedness a judge could muster. That doesn't mean he actually got every case right; SCOTUS voting statistics unmistakably reveal the extent of my doubts on that score. But that Nino engaged with all arguments? That he assessed them honestly and on the merits? That he took others' views seriously? That those views could lead him to change his mind? Of all that, I have not

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a doubt in the world. And that is much of what one can hope for in a judicial colleague.

And in the times we disagreed, Nino made my own work better. That was true literally from my first opinion, in a routine bankruptcy case. The Court's tradition is that a Justice's maiden opinion be unanimous. And wasn't Nino supposed to venerate tradition? So surely, I thought, he would sign onto my opinion, even though he (alone) had voted the other way at conference. But I thought wrong. Nino delighted in the clash of ideas; what was the point, he asked me (as he pretended to seek my permission for his dissent), of a tradition that suppressed it? (In the same vein, he often told me, and I've come to agree, that if a judge takes disagreement or criticism personally, she is in the wrong business.) And so I found myself responding to Nino's incisive views on the car-ownership deduction and, in so doing, making my own argument more precise and rigorous. From that day onward, I wrote many of my opinions with the image of a little Nino sitting on my right shoulder. That Nino never got me to pull my punches. To the contrary, he led me (as I think the real Nino would have liked) to work harder and dig deeper, to search for the arguments that would be able to withstand his mighty ripostes, to plug every analytic hole, and even remove every stylistic infelicity, that I could identify in my first drafts. (When I left in one of those stylistic gaffes, I would sometimes hear about it by private memo; after explaining that he was writing only because he knew I cared about such things, Nino would instruct me, with humor and tact, on some finer point of grammar or word usage that had escaped my notice.) Nino upped my game as a judge, just as he had when I was Solicitor General. I hope it is not presumptuous to say that I think he did the same for the entire Court.

I loved being Nino's friend too. That friendship grew in an unlikely way — on numerous hunting trips we took together. When I got to the Court, I told Nino that during my confirmation process, many Senators had asked me about my urban background and my lack of familiarity with guns and hunting. I had little to say in response — until the day I promised one of them that if confirmed, I would ask Justice Scalia to take me hunting with him. So, I said to Nino, the single pledge I had made in some 75 senatorial courtesy visits rested in his hands. He laughed and laughed and laughed. Then he and one of his sons-in-law took me to his gun club and gave me a shooting lesson. I found I liked it. So in an act of supreme generosity, he introduced me to his longtime hunting friends and included me within their fold. We went to Wyoming once, where neither of us succeeded in shooting an antelope. We went to Mississippi, where both of us downed a lot of ducks. We took a few daytrips each year to places in Virginia to shoot quail and pheasant. And on the way there and back we talked. He was as funny as he was erudite, as warm as he was brilliant, as charm-



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ing as he was sharp-witted. We talked about books we were reading. We talked about our two different religions and the meaning of faith. We talked about politics, even though there we usually disagreed. We talked about the love he had for, and the joy he took from, his family. Occasionally we talked about the Court or the law. I remember a long conversation we had once about whether a Justice should think about his or her legacy. He thought not — that such concerns could only get in the way of proper judicial decisionmaking. I cherish those conversations with Nino now. I miss him.

When we had that talk about judicial legacy, I told him that in any event he needn't worry. I said much the same when I had the honor last year to give the Antonin Scalia lecture at Harvard. (In typical-Nino fashion, he watched a videotape of my talk, which concerned statutory interpretation, and sent me a long email discussing our agreements and differences.) A hundred years from now, no one will know what many of us on the Court today either wrote or accomplished. That is not true of Justice Scalia. He will go down in history as one of the most significant of Justices — and also one of the greatest. His articulation of textualist and originalist principles, communicated in that distinctive splendid prose, transformed our legal culture: It changed the way almost all judges (and so almost all lawyers) think and talk about the law — even if they part ways, at one or another point, from his interpretive theories. Does anyone now decline to focus first, in reading a statute, on its text in context? Does anyone now ignore the Founders' commitments when addressing constitutional meaning — or just as important, dispute the need for a viable theory of constitutional interpretation, even if not Justice Scalia's brand of originalism, to constrain judges from acting on their personal policy preferences? If the answer is no (and the answer is no), Justice Scalia deserves much of the credit. For that reason as well, I am deeply grateful for the opportunity I had, during my first years on the bench, to serve with and learn from this most remarkable jurist.

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*Rachel E. Barkow\**

When people learn that I clerked for Justice Scalia, they often respond with raised eyebrows or a look of concern. The people who

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respond this way tend to fall into one of three camps. In one are those who know that my political views lean more left than right and are surprised that I clerked for such an outspoken conservative jurist. In a second category are those who do not know my politics, assume I share the Justice's conservative outlook because I worked for him, and all too often proceed to judge me negatively as a result. (Maybe my neighborhood in New York City and career in academia put me in disproportionate contact with Democrats as opposed to Republicans, but the negative reaction is by far the more common one.) And a third group seems to view me as some kind of survivor because of assumptions they make about the Justice's personality. Because his opinions — and especially his dissents — did not pull their punches in attacking contrary positions, I think some might be left with the impression that Justice Scalia was a walking embodiment of his writing style. But nothing could be further from the truth. Although sometimes his dissents read as angry and embittered, the man himself was kind and full of laughter.

These responses have been pretty consistent from the moment Justice Scalia offered me the clerkship roughly twenty years ago, so I am used to them. I will admit that, in the early years, I responded defensively. Sometimes I would volunteer some random liberal fact about myself just to make clear that Justice Scalia and I did not share the same views on all matters. Over time, I stopped caring so much about what people assumed about me and instead grew increasingly troubled about what their reactions assumed about Justice Scalia. Since he passed away, I have been particularly saddened by these negative responses, and not just because I think they show disrespect for his memory, though that is part of it.

More fundamentally, these responses show that many (likely most) people do not believe there is a separation between one's judicial philosophy and one's political or personal views. I am a Democrat, but I do not believe the Constitution enshrines all the values I would like to see prevail in the political process. I do not believe the courts exist as just another forum to be used for the achievement of substantive ends. I share Justice Scalia's view — and the view of many others, such as John Hart Ely — that the democratic process is the place to win most battles over contested social issues (except for the relatively rare situations where the Constitution does, in fact, address the issue).

I imagine Justice Scalia and I probably did not often vote for the same candidates or have similar reactions to cultural change (what I would call progress, he might view as decline). Indeed, we disagreed on some of the most fundamental issues of the day. But we both believed the role of a judge to be distinct from the role of a voter or an elected representative. A judge is not supposed to turn a statute into something it is not just to achieve a particular end, and the Constitution is not a document that resolves every cultural battle. I did not be-

lieve it was his job to find all the things I valued in the Constitution, and he did not expect me to figure out a way for him to get to a desired end point. When we approached a constitutional question in a case during my clerkship, we did so as lawyers, not as politicians. And you would be hard-pressed to find a better lawyer to work with than Justice Scalia.

The assumption that there is no real separation between judging and voting is all the more disturbing to me when it is applied to Justice Scalia because it stands in such stark opposition to Justice Scalia's commitment to law — even when that commitment produced outcomes in many cases that I doubt he preferred.<sup>12</sup> That is not to say that I agree with all of Justice Scalia's opinions as a matter of law. Even putting political views aside and analyzing cases on his own terms (text, history, and structure), I think there are a number of opinions — and not an insignificant number — that he should have resolved differently. I am not so naïve as to believe politics and the individual ideology of a Justice play no role in how cases get resolved. But I have no end of respect for the fact that I can make assessments about whether Justice Scalia's opinions are consistent with his methodological commitments because Justice Scalia set out those commitments with such clarity.<sup>13</sup>

One of the reasons Justice Scalia disliked balancing tests so much was precisely because it is almost impossible to predict how a case should come out using one. Who is to say who is right and wrong when the “test” is to take everything into account and come out with an answer? Justice Scalia lived by bright lines, making it particularly straightforward to assess whether he stayed within them. Far more often than not, he did. And if you put aside what you think of case outcomes and just focus on analysis, ask yourself how often you found yourself reading a Justice Scalia opinion and thinking he got the better of his colleagues.

But not everyone is a lawyer or thinks like one. (We in the legal academy would be in trouble if they did.) Many of the people who react with some hostility to my clerkship with Justice Scalia are not lawyers, and it is not fair to expect them to see a line between law and

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<sup>12</sup> The flag burning case is probably the most cited illustration of this commitment to methodology, but there are many others, especially those cases in which the Justice came out in favor of criminal defendants. For some examples, see Rachel E. Barkow, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 15 (2006).

<sup>13</sup> See Letter from Rachel E. Barkow, Assoc. Professor of Law, N.Y.U. Sch. of Law, to Orrin G. Hatch, U.S. Senator (Sept. 24, 2006), as reprinted in Rachel Barkow, *A Scalia Clerk Remembers Her Former Boss*, OBSERVER (Feb. 13, 2016), <http://observer.com/2016/02/a-tribute-to-justice-scalia-from-his-former-clerk> [<https://perma.cc/787T-LPTB>].

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politics that even many lawyers believe does not exist or is blurry at best.

And yet their reactions still cause me pain because they reflect the sharp fault lines in our society today. Even assuming politics plays some role in the Court's decisions, why can't two people of different political leanings work together to resolve legal issues? All too often, people with different political views fail to see the common ground they share and instead focus only on the things that separate them.

Justice Scalia, to his great credit, never embraced an us-versus-them mentality. That might be surprising to some given the turns of phrase that he deployed so effectively and the bombastic tone of so many of his dissents. But one of the reasons he wrote the way he did was because he believed that readers could be persuaded to his point of view if the arguments were made clearly and powerfully enough. He thought people could change their minds when faced with empirical facts or a logical line of argument. He certainly changed his mind on important legal issues in the face of compelling arguments, as I witnessed firsthand on various occasions.

He also never doubted that people of different ideological views could work together, could be friends, and could respect and enjoy their differences. Indeed, the same Justices who wrote majority opinions that Justice Scalia targeted for some of his most vicious attacks have praised Justice Scalia's intellect and his sense of humor. Justice Ginsburg — his "best budd[y]" on the Court — appreciated how his dissents made her majority opinions better and observed his "rare talent to make even the most sober judge laugh."<sup>14</sup> Justice Stevens wrote in tribute that Justice Scalia was "a good friend, a brilliant man with an incomparable sense of humor, and as articulate as any Justice who ever served on the Court."<sup>15</sup> One former law clerk to Justice Scalia has recounted that Justice Scalia and Justice Brennan "got along famously, notwithstanding some fundamental disagreements."<sup>16</sup> She tells the story of Justice Scalia attending a birthday party for Justice Brennan in which many of Justice Brennan's most important decisions had been displayed on a table.<sup>17</sup> When Justice Scalia saw the display and remarked, "So little time, so much to overrule!," Justice Brennan responded by "roar[ing] with laughter."<sup>18</sup>

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<sup>14</sup> Press Release, Supreme Court of the U.S., Statements from the Supreme Court Regarding the Death of Justice Antonin Scalia (Updated), (Feb. 15, 2016), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_02-14-16](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16) [<https://perma.cc/F9HA-CFFK>].

<sup>15</sup> *Id.*

<sup>16</sup> *Antonin Scalia — A Justice in Full*, NAT'L REVIEW (Feb. 29, 2016, 4:00 AM), <http://www.nationalreview.com/article/432005/antonin-scalia-supreme-court-justice-remembrances> [<https://perma.cc/77UB-Z56M>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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Justice Scalia's colleagues recognized that, when Justice Scalia wrote a blistering dissent or an impassioned opinion about the role of a court in a democracy, it was never a personal attack on those who disagreed with him.<sup>19</sup> Instead, it was a reflection of his own fervent commitment to what he saw as the rule of law. He wrote the way he did not to take others down, but instead to get readers to see his point of view. I can't say his strategy was always effective — particularly when his opinions took an angry or belittling tone. But the motive was to win the legal argument. And he understood that was what his colleagues were doing as well when they disagreed with him — and he respected them for it.

Justice Scalia valued dissent and differences of opinion so much that he asked would-be law clerks during their interviews to pick an opinion of his they thought was wrong and tell him why. I remember vividly the pointed discussion we had in my interview. It ranks as one of the strangest and most enjoyable job interviews I've ever had. At many other job interviews, the applicant is asked some version of the "what is your worst attribute" question. In a Justice Scalia interview, he essentially asked job applicants to tell him about *his* worst traits. And he picked those who most effectively tore down his legal analysis because he recognized that better overall outcomes would be reached if he hired people who were willing to tell him when they thought he was wrong.<sup>20</sup>

Justice Scalia did not let legal or political disagreements stand in the way of friendships or of respect for others. It would make no more sense to him for jurists of different views to be enemies off the bench than for players from opposing sports teams to decide friendship was impossible. Justice Scalia respected his colleagues' skills and recognized what they had in common, even if he hoped to win readers over to his point of view when they faced off against each other. This is not to say that Justice Scalia viewed legal and political disagreements as insignificant. He surely did not. It is instead to say that he also viewed friendship and respect as independently important — and as necessary to developing proper understandings of complex problems.

It is always tempting to close off those views we do not like and to seek positive affirmation of our own beliefs. But true growth and learning come only from seeking out different points of view. Certainly to be a great lawyer, one has to see all sides of an issue and appreciate opposing arguments. Justice Scalia lived by these values, and

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<sup>19</sup> As Justice Scalia himself put it: "I attack ideas. I don't attack people. And some very good people have some very bad ideas. . . . And if you can't separate the two, you gotta get another day job." *60 Minutes: Justice Scalia on the Record*, *supra* note 10.

<sup>20</sup> For a wonderful tribute to Justice Scalia that describes the role of the so-called counter-clerk, see Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 NYU J.L. & LIBERTY 1 (2016).

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whether you agreed or disagreed with him, there is no doubt that every issue became sharper with him in the debate.

But most of all, Justice Scalia brought a joy to the battle itself. He loved legal arguments. There is a reason oral argument transcripts at the Court are often filled with notations of laughter after Justice Scalia makes an observation. I am having a hard time remembering any discussion in his chambers that did not involve an awful lot of laughter, especially from the Justice.

Indeed, of all the memories I have, the sound of Justice Scalia's laugh is the most prominent. He had a contagious laugh that spread pure joy to those who heard it. Now when someone reacts negatively to hearing that I clerked for Justice Scalia, that laugh echoes in my mind. And the joke is on anyone who doesn't realize that working with Justice Scalia was the greatest job a lawyer could have.

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*John F. Manning\**

I worked for Justice Scalia during October Term 1988. He was a relatively young man, only two years on the Court, and still working things out. He was not yet the imposing presence he would become, in both the law and the public imagination. In the up-close experience of clerking for the early Justice Scalia, it was easy to see the qualities that would make him such a compelling figure in later years. He tried to run his chambers in a way that would help him "get it right." He was a formalist who loved the craft of the law — but not for its own sake. He viewed every case as an occasion to think about the proper allocation of power in our constitutional democracy — and, in particular, about the appropriate role of an unelected, life-tenured judge like himself. That focus enabled him to see — and to help us and others to see — even the dullest case as vivid, exciting, and consequential.

*First*, Justice Scalia ran his chambers with exceptional openness. This posture, I think, reflected partly that he was a former academic who liked mixing it up with young people, but even more that he wanted his clerks always to test and challenge his own assumptions.

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\* Bruce Bromley Professor of Law and Deputy Dean, Harvard Law School. I am grateful to Richard Bress, Paul Cappuccio, Bradford Clark, Susan Davies, Richard Fallon, Jack Goldsmith, William Kelley, Lawrence Lessig, Gillian Metzger, Martha Minow, Henry Monaghan, Benjamin Sachs, Eugene Scalia, Patrick Schiltz, and David Strauss for excellent comments on an earlier draft.

Although he was (as he joked) a “Supreme Justice,” and we were five twenty-somethings,<sup>21</sup> he made it clear that we should speak freely, even — perhaps especially — when we disagreed with him. The meetings the Justice held with his clerks the day before the Court’s Conferences were free-for-alls. The clerks would argue with one another and with the Justice — loudly, passionately, and utterly without fear that we would offend the Boss.

Of course, if he disagreed with one of us, he would let us know. (I’m sure all of his clerks remember, at one time or another, his breaking into his trademark laugh, waving his hand, and saying: “Get out of here! You’re crazy!”) But everything was part of a true give and take. We were of little use to him unless he could depend on us to let him know if we thought he was getting something wrong. Though we all knew of course that he was the decider, about the only time Justice Scalia overtly pulled rank was when one of us got a little over-invested, and he would have to say: “Hey, remember, it’s my name that has to go on that opinion.”

*Second*, Justice Scalia put legal craft front and center. He wanted us to do the same. On a side table in the room where we all met sat a framed embroidery that reminded us, as it did him, that “Nothing Is Easy.” Justice Scalia took that to heart. He sweated over every case. He pored over not only the opinions he wrote but also those he joined. He always took the time to verify the substantive accuracy of his draft opinions’ legal citations (which we gave to him on what came to be known as “The Cart” because, well, it was a cart!). And we watched him, both in cases and in academic writings, struggle (in the good sense) over hard questions about how to balance originalism against stare decisis,<sup>22</sup> how to understand the felt duty of judicial restraint,<sup>23</sup> and even how to come to terms with what for him was the uncomfortable fact that a federal judge must sometimes “make law” when the Constitution or a statute calls for it.<sup>24</sup> Taking nothing for granted, Justice Scalia thought hard and self-consciously about how to do his job.

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<sup>21</sup> Typically, the law clerk to a retired Supreme Court Justice will double as a law clerk to a sitting Justice. During October Term 1988, the law clerk to retired Chief Justice Warren E. Burger also served as a fifth Scalia clerk.

<sup>22</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part) (discussing the relationship between stare decisis and society’s longstanding reliance on well-known precedent); *South Carolina v. Gathers*, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting) (arguing that the Court should not be deterred from overruling a decision because of its recentness and suggesting that it would be “a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face,” *id.* at 825).

<sup>23</sup> See, e.g., Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>24</sup> See *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) (arguing that when a Fourth Amendment “question comes down to whether a particular

*Third*, Justice Scalia loved the law. No case was too small or too dull to command his full attention and enthusiasm. On the first Friday after the first Monday in October, Justice Scalia buzzed me to report, with true delight, that Justice Brennan had assigned him *Pittston Coal Group v. Sebben*,<sup>25</sup> a case that was literally about whether one set of expired interim regulations was “more restrictive”<sup>26</sup> than another set of expired interim regulations.<sup>27</sup> By consensus of the clerks, it was the worst case of the sitting, the one picked absolutely last when that month’s cases were divvied up by the clerks in the Scalia chambers (and probably in every other chambers, as well). But the way Justice Scalia dug into *Pittston Coal*, you would have thought it was the second coming of *Marbury*<sup>28</sup> or, better still, *Chevron*.<sup>29</sup>

*Fourth*, as I suggested at the outset, all of these tendencies grew out of, and reinforced, Justice Scalia’s conviction that his job, in every case, was to think about what his decision implied for the allocation of power in our constitutional democracy. As a law student, Justice Scalia cut his teeth on Hart and Sacks and the idea of “institutional settlement” — the proposition that we, as a society, agree to resolve our differences peacefully through particular institutions using particular procedures.<sup>30</sup> As a law professor — and for that matter, as a public official and judge — Justice Scalia also lived and breathed administrative law,<sup>31</sup> which invites its practitioners to think explicitly about the assignment of authority and the means of its exercise. Justice Scalia had not made the content of individual constitutional rights the focus of his professional career. Instead, as his famous dissent in *Morrison v. Olson*<sup>32</sup> suggests, he had thought a great deal more about the question of “Power” — about which governmental institutions, including

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search has been ‘reasonable,’ the answer depends largely upon [judicial assessment of] the social necessity that prompts the search”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (acknowledging “that the ‘traditional tools of statutory construction’ include . . . the consideration of policy consequences”).

<sup>25</sup> 488 U.S. 105 (1988).

<sup>26</sup> 30 U.S.C. § 902(f) (2012).

<sup>27</sup> See *Pittston Coal*, 488 U.S. at 113.

<sup>28</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>29</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In those days, Justice Scalia was very keen on the *Chevron* doctrine. See Scalia, *supra* note 24, at 516–17 (praising *Chevron*).

<sup>30</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Justice Scalia took the Legal Process course while a student at Harvard. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994).

<sup>31</sup> See *Biography of Associate Justice Antonin Scalia*, SUP. CT. U.S. (last updated Sept. 19, 2016), <https://www.supremecourt.gov/about/biographyScalia.aspx> [<https://perma.cc/2UBZ-XNXB>] (detailing Justice Scalia’s extensive involvement in the administrative law community).

<sup>32</sup> 487 U.S. 654 (1988).



the Court, have the right to exercise official power in what circumstances.<sup>33</sup>

In cases big and small, this approach emboldened Justice Scalia to challenge long-accepted legal fictions, especially those that masked the transfer of unwarranted power to judges. In a “dormant commerce clause” case decided his first Term on the Court, Justice Scalia had the temerity to notice that, despite decades of case law, the Commerce Clause empowers Congress, and *not* the Court, to keep the lanes of interstate commerce free of state obstruction.<sup>34</sup> That same Term, Justice Scalia wrote a beautiful dissent that eviscerated the so-called “*Feres* doctrine”<sup>35</sup> — a then-thirty-seven-year-old judge-made exception to the Federal Tort Claims Act for service-related claims filed by servicemembers.<sup>36</sup> After demonstrating the confusion that *Feres v. United States*<sup>37</sup> had wrought over the years, Justice Scalia lamented that the exception existed only by virtue of the Court’s impermissibly “ignoring what Congress wrote and imagining what it should have written.”<sup>38</sup> The next Term, he cast a harsh light on the ad hoc, case-by-case policy discretion that the Court gave to itself by using judge-made, multifactor balancing tests<sup>39</sup> — at that moment, an increasingly popular judicial technique.<sup>40</sup> In a particularly memorable separate opinion, he wrote that, when such a test asked judges to balance incommensurable values (as was often the case), the resulting inquiry was no more meaningful than asking “whether a particular line is longer than a particular rock is heavy.”<sup>41</sup> In other words, a balancing test of that sort had no resolving power; it just provided cover for the exercise of raw judicial discretion.

Justice Scalia expected his clerks to think in those terms — to focus on the way the Constitution allocates power and, in particular, on the proper role of the federal courts. And he always led by his example.

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<sup>33</sup> *Id.* at 699 (Scalia, J., dissenting).

<sup>34</sup> See *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) (noting that “[t]he text of the Clause” makes plain that it “is a charter for Congress, not the courts” to remove obstacles to the flow of interstate commerce).

<sup>35</sup> See *Feres v. United States*, 340 U.S. 135 (1950).

<sup>36</sup> See *United States v. Johnson*, 481 U.S. 681, 692–703 (1987) (Scalia, J., dissenting). Justices Brennan, Marshall, and Stevens joined his dissent. *Id.* at 692.

<sup>37</sup> 340 U.S. 135.

<sup>38</sup> *Johnson*, 481 U.S. at 702 (Scalia, J., dissenting).

<sup>39</sup> See *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (arguing that “the ‘totality of the circumstances’ mode of analysis” adopts an approach that is not “confined by any rule” and authorizes “ad hoc judgment”).

<sup>40</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963–72 (1987).

<sup>41</sup> *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

Justice Scalia could not analyze the nondelegation doctrine without asking about the judiciary's capacity to draw principled lines between permissible and impermissible delegations.<sup>42</sup> For him, moreover, the proper scope of the harmless error doctrine in a criminal case was no technicality; it was about preserving the defendant's right to have a jury (rather than a court) decide his or her guilt or innocence, no matter how overwhelmingly the trial record might point toward guilt.<sup>43</sup> And building on an insight from the prior Term, Justice Scalia reiterated that if the Court "borrowed" another federal limitations period when Congress omitted one from the statute at hand, the result would do violence to a state's default constitutional authority to prescribe such background rules unless and until Congress displaces them by positive enactment.<sup>44</sup>

By exposing the human agency in such doctrines, Justice Scalia made it exciting and meaningful to think about issues that, in the hands of others, might seem less interesting and consequential. Perhaps that gift helped him gain so much traction in his years on the Court. Consider statutory interpretation, the field I know best. It is easy to forget how different the world was before his time — how heavily the Court leaned on legislative history<sup>45</sup> and how readily the Justices enforced the spirit rather than the letter of the law.<sup>46</sup> These practices had gone largely unquestioned for generations,<sup>47</sup> in some cases for centuries.<sup>48</sup> Justice Scalia changed the terms of debate.<sup>49</sup> He

<sup>42</sup> See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

<sup>43</sup> See *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring in the judgment) (arguing that an erroneous jury instruction concerning the elements of an offense could "not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury").

<sup>44</sup> See *Reed v. United Transp. Union*, 488 U.S. 319, 334 (1989) (Scalia, J., concurring in the judgment); see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 163, 166 (1987) (Scalia, J., concurring in the judgment) (arguing that the Court lacks power to go "prowling hungrily through the Statutes at Large for an appetizing federal limitations period" when Congress has supplied none and that a relevant state limitations period applies of its own force unless and until a federal statute preempts it, *id.* at 166).

<sup>45</sup> See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982); *Steadman v. SEC*, 450 U.S. 91, 100–02 (1981). In one case, the Court even remarked: "The legislative history . . . is ambiguous . . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971).

<sup>46</sup> See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–02 (1979); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 9–10 (1976).

<sup>47</sup> The Court's copious use of legislative history dates back to the end of the New Deal. See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 302–03 (1982).

<sup>48</sup> In one form or another, the preference for spirit over letter goes back, at least, to Aristotle. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 n.6 (2001).

<sup>49</sup> The Court is now less inclined to use legislative history — and much less inclined to use it as a dispositive source of meaning. See JOHN F. MANNING & MATTHEW C. STEPHENSON,

showed that it was all about the allocation of power. And even when an arrangement was “clad, so to speak, in sheep’s clothing,”<sup>50</sup> Justice Scalia could always spot the wolf.

His resistance to legislative history was not empty formalism. It was about checking the transfer of legislative power from Congress and the President to unrepresentative committees, individual legislators, staff, lobbyists, or even judges.<sup>51</sup> His preference for the letter over the spirit of the law was not just a better way of finding what the legislature meant.<sup>52</sup> It was about protecting the messiness of American democracy against the self-aggrandizing presumption that judges could and should gloss over the awkward compromises that are the staple of our legislative process — and, by extension, of our democracy itself.<sup>53</sup>

All of this was terribly inspiring to the young men and women who had the privilege to help him. And as I saw first-hand in the many times Justice Scalia generously visited his alma mater in recent years,<sup>54</sup> those same qualities inspired others too. He inspired our students with his plain-spokenness, his sense of humor, his generosity of spirit, his playfulness, and the power of his ideas. He also inspired them with his openness. All humans, even “Supreme Justices,” make mistakes. It takes a special strength of character for someone so important to con-

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LEGISLATION AND REGULATION 163–65 (2d ed. 2013) (summarizing evidence about the Court’s change in practice). The Court has now repeatedly stated, moreover, it will not alter the clear import of the statute in order to effectuate the statute’s background spirit or purpose. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

<sup>50</sup> *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

<sup>51</sup> *See Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (noting that the passages of committee reports on which the Court relied “were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction”).

<sup>52</sup> Justice Scalia was a thoroughgoing intent skeptic; he described “the quest for the ‘genuine’ legislative intent [as] probably a wild-goose chase.” Scalia, *supra* note 24, at 517.

<sup>53</sup> Justice Scalia consistently maintained that rewriting a statute threatened to disrupt unknowable, potential compromises. *See, e.g., E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment) (“The final form of a statute . . . is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther.”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) (arguing that “[d]eduction from the ‘broad purpose’ of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose”).

<sup>54</sup> *See, e.g., Jack Minch, It’s Moot, But It Matters: Scalia Helps Judge Law School Case Competition*, HARV. L. TODAY (Nov. 20, 2014), <http://today.law.harvard.edu/moot-matters-scalia-helps-judge-law-school-case-competition> [https://perma.cc/AN9Y-MESK]; Elaine McArdle, *In Inaugural Vaughan Lecture, Scalia Defends the “Methodology of Originalism,”* HARV. L. TODAY (Oct. 3, 2008), <http://today.law.harvard.edu/in-inaugural-vaughan-lecture-scalia-defends-the-methodology-of-originalism> [https://perma.cc/M33V-SU93].

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fess error so publicly. Justice Scalia always impressed my students with his willingness to take seriously criticism from legal novices he did not know and would not see again — and to acknowledge to total strangers that he did not always get things right. For him, the issues he cared about were not personal; they were matters of principle that people should discuss, debate, and try to get right.

Justice Scalia left a big impression on the law and on those who knew him. Because of his love for the law, his extraordinary gift of expression, his readiness always to question convention, and his commitment to principle, Justice Scalia's ideas will long outlive his days on earth. He was a natural teacher and a dedicated mentor. Justice Scalia wanted to teach his law clerks not only the lawyer's craft, but also the lesson that one's commitment to principle is tested only when it hurts. Justice Scalia was open, kind, funny, and generous. He was a wonderful friend. I will miss him.

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*Martha Minow\**

“Just call me Nino.” These were the first words that I heard when I first met with Justice Scalia. That is not usually how the conversation begins with famous and distinguished people. His warmth and his willingness to be genuine overwhelmed me. These qualities defined each of the interactions that I had with him.

His zest for having a real conversation, for connecting about family, about religion, about law, and about ideas was generous, engaging, and contagious. He knew that I did not agree with most of his conclusions, whether related to his methods of interpretation or how he voted in many cases. It did not matter to him. In fact, I think our divergence was a plus. He really liked argument and discussion. He made the exchange of ideas fun. There is just no other way to describe it.

I also, of course, have taught his opinions for years. His writing is pithy and memorable. He upped the game for the Supreme Court. Who can write a more memorable sentence? He excelled at that. He brought record levels of humor to the exchanges between advocates and Justices at the Court.<sup>55</sup> He similarly elevated questioning from the bench. He helped to make Supreme Court arguments more meaningful.

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\* Morgan and Helen Chu Dean and Professor, Harvard Law School.

<sup>55</sup> Adam Liptak, *A Taxonomy of Supreme Court Humor*, N.Y. TIMES (Jan. 24, 2011), <http://www.nytimes.com/2011/01/25/us/25bar.html> [<https://perma.cc/R3UW-J2P2>] (discussing Ryan A.

His legacy will be transformative. Perhaps most notable is how he made originalism and textualism meaningful and essential frameworks for analysis.

In an interview before a group of students and colleagues in Brazil, he offered this comment:

I will tell you the killer argument in favor of originalism. I go to law schools just to make trouble. I give lectures and stir up the students. It takes several weeks for their professors to put them back on track. And what I tell them is: ask your professor. Your professor is probably not an originalist. That means he is a non-originalist. But that is not a philosophy of interpretation. It just means he does not agree with Scalia. But, then, what is your theory of interpretation? Scalia knows what he's looking for. He's looking for the understanding that the people had of the terms that were adopted. Once you show him what that understanding was — you got him. He is handcuffed — he cannot do the nasty, conservative things he would like to do to society.<sup>56</sup>

He continued:

How do you control your judges? You know what? Think about it. There is no other possible criterion except “what did this text mean, what did the people understand it to mean, when it was adopted.” You either adopt that or you tell your judges — wise, wonderful judges who went to Harvard, Stanford, and maybe even Yale Law School — you must know the answers to all these profound moral questions like homosexuality, abortion, suicide. . . . You either use originalism or you tell your judges: “You govern us, whatever you think is good is okay. Whatever you think is bad is bad.”<sup>57</sup>

Leave it to Justice Scalia to state so clearly the challenge that he created for all of us who do not identify as originalists or textualists. That is one aspect of his lasting legacy. Another legacy is the memorable and vivid prose of his opinions. In the years ahead, there will be dimensions that will surprise many. Still another is his commitment to liberty even for individuals whose actions deviated from his own values.

Thus, he provided the fifth and deciding vote upholding the right of an individual to burn the United States flag.<sup>58</sup> In later reflections, he noted, “If it were up to me, I would put in jail every sandal-

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Malphurs, “*People Did Sometimes Stick Things in My Underwear*”: *The Function of Laughter at the U.S. Supreme Court*, 10 COMM. L. REV. 48 (2010).

<sup>56</sup> Caio F. Rodriguez et al., *Teorias Contemporâneas da Interpretação Constitucional: Entrevista com o Ministro Antonin Scalia, da Suprema Corte dos EUA*, 250 REVISTA DE DIREITO ADMINISTRATIVO 15, 25 (2009).

<sup>57</sup> *Id.*

<sup>58</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

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wearing, scruffy-bearded weirdo who burns the American flag, . . . [b]ut I am not king.”<sup>59</sup>

A further legacy I hope will long endure is his demonstration of the possibilities of friendship, not despite but because of differences. That is something that the Harvard Law School strives to cultivate and exhibit every day. This elevation of human connection and respect, necessary for rational debate but valuable well beyond it, is exemplified by a community of people devoted to the study and development of law. This very commitment, I believe, is one reason he loved this, his law school. It is one reason I love this school. And here again, I want to end just by quoting him. He said, “My best friend on the Supreme Court is Ruth Ginsburg.” “Opera,” the interviewer said. He said, “Not just opera, a lot of things. We spend New Year’s Eve together with our families and we’ve done it for twenty-five years. She’s a nice person. I like her. She likes me. But we don’t agree on law, and it’s all right.”<sup>60</sup> Inspired by Justice Scalia, let us disagree and still nurture deep friendships with the very people with whom we disagree.

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*Cass R. Sunstein\**

Justice Antonin Scalia was not only one of the greatest justices in the Court’s history, and among its three best writers (alongside Justices Oliver Wendell Holmes, Jr., and Robert Jackson). He was also the Court’s most impressive defender of “originalism,” which he understood to require judges to follow the “original public meaning” of constitutional provisions.<sup>61</sup> At the same time, Justice Scalia was a superb

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<sup>59</sup> Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning “Weirdoes,”* NAT’L CONST. CTR.: CONST. DAILY (Nov. 12, 2015), <http://blog.constitutioncenter.org/2015/11/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes> [<https://perma.cc/6GLK-KA2C>].

<sup>60</sup> Interview by Caio F. Rodriguez & Marcio S. Grandchamp with Antonin Scalia, Assoc. Justice, Supreme Court of the United States, in Rio de Janeiro, Braz. (May 15, 2009).

\* Robert Walmsley University Professor, Harvard University. I am grateful to Martha Minow and Mark Tushnet for valuable comments on a previous draft, and to Lauren Ross for excellent research assistance and helpful suggestions.

<sup>61</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 38–39 (Amy Gutmann ed., 1997). There are many forms of originalism, and some of them allow, or invite, something like living constitutionalism. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013). For present purposes, I am bracketing debates over the preferred specification of originalism and taking it in the form that Justice Scalia understood it.

practitioner of “living constitutionalism,” which I understand to suggest that the meaning of constitutional provisions evolves over time, through a process akin to the evolution of the common law.<sup>62</sup> That is a paradox. What explains it?

As Exhibit No. 1, consider Justice Scalia’s majority opinion in *Lujan v. Defenders of Wildlife*.<sup>63</sup> The question in that case was whether Congress has the constitutional power to grant citizens, as such, the right to sue to require the Secretary of the Interior to enforce the Endangered Species Act.<sup>64</sup> The answer to that question speaks directly to the constitutionality of numerous other statutes that purport to give causes of action to citizens seeking to enforce the law, especially in the environmental area.<sup>65</sup>

An originalist would start with the words of Article III, which limits judicial power to “Cases” and “Controversies.”<sup>66</sup> Those words are hardly self defining, and the originalist question is straightforward: what was their original public meaning? There is a strong historical argument that Article III required plaintiffs to *identify some source of law that created a cause of action*.<sup>67</sup> On that view, access to federal courts is unavailable unless a relevant law (most obviously, a statute) grants plaintiffs a right to sue. There is also a strong historical argument that if Congress granted such a right to citizens, taken simply as such, there would be no constitutional problem.<sup>68</sup> The old prerogative writs, familiar in English law, did precisely that, and both Congress and the young states appeared to follow that lead.<sup>69</sup>

It follows that in *Lujan*, the most straightforward originalist opinion would conclude that Congress can indeed give citizens a cause of action to require public officials to implement the law. There is no constitutional problem if it does so, because a congressional grant of a cause of action creates an Article III “case.” To be sure, some people have read the history differently,<sup>70</sup> but theirs is a minority view. If the

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<sup>62</sup> The best discussion is DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>63</sup> 504 U.S. 555 (1992).

<sup>64</sup> *Id.* at 557–58.

<sup>65</sup> For examples, see Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992).

<sup>66</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>67</sup> See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). For some valuable data on the origins of standing doctrine, see Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010).

<sup>68</sup> See Winter, *supra* note 67.

<sup>69</sup> See *id.*; Sunstein, *supra* note 65.

<sup>70</sup> See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

minority is right, of course, an originalist opinion would say so, invoking whatever historical materials might be assembled in support of that conclusion.

Justice Scalia's opinion for the Court did not say much about the text of the Constitution, and it is quiet about the relevant history. It struck down an act of Congress — actually, many acts of Congress — on the basis of the two hallmarks of living constitutionalism: a (contentious) reading of the Court's own precedents and a (controversial) set of theoretical commitments. With respect to precedent, Justice Scalia wrote that “our cases have established that the irreducible constitutional minimum of standing contains three elements,” of which the most important is an “an ‘injury in fact’ — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not conjectural’ or ‘hypothetical.’”<sup>71</sup>

By itself, that reading of precedent does not dispose of the specific issue in *Lujan*. Perhaps a citizens' suit provision created such an injury? Rather than investigating history, Justice Scalia said that it greatly matters “whether the plaintiff is himself an object of the action (or foregone action) at issue.”<sup>72</sup> If so, he will usually have standing. But when, as in *Lujan* itself, “a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed.”<sup>73</sup>

As he went on to explain, the purpose of the judiciary is to vindicate the rights of individuals, not the public as a whole. “Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”<sup>74</sup> Indeed, the Take Care Clause would itself be compromised if Congress were permitted “to convert the undifferentiated public interest in executive officers' compliance with the law into an ‘individual right’ vindicable in the courts.”<sup>75</sup>

It's a theory, and it sounds good, and in a sense it might even be right. But is it originalism? The closest sources for these conclusions are not the ratification debates or the *Federalist Papers*, but the arguments in a powerful and provocative 1983 article in the *Suffolk University Law Review*, with the revealing title, *The Doctrine of Standing as an Essential Element of the Separation of Powers*.<sup>76</sup> That

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<sup>71</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (citations omitted).

<sup>72</sup> *Id.* at 561.

<sup>73</sup> *Id.* at 562 (emphasis omitted).

<sup>74</sup> *Id.* at 576 (emphasis omitted).

<sup>75</sup> *Id.* at 577.

<sup>76</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).



article, which the *Lujan* opinion essentially tracks, does not draw on the original understanding. Instead it offers a series of (plausible) claims, rooted in abstract theory, about the relationship between standing doctrine and democratic self-government. Its author is Justice Antonin Scalia.

*Lujan* is a case about standing; Justice Scalia also put the historical sources to one side in helping to establish modern takings doctrine, which is oriented by one case above all others: *Lucas v. South Carolina Coastal Council*.<sup>77</sup> The case involved a South Carolina law that had the effect of rendering certain property essentially valueless. The central holding was that in such cases, there is a per se taking, and landowners must be compensated.<sup>78</sup> Justice Scalia candidly acknowledged the difficulty of explaining this rule. For an uncompromising originalist, the central inquiry would be plain: What was the original understanding of the Takings Clause? Indeed, there is extensive historical work on that question, and it suggests a jarring conclusion: The Takings Clause applied only to physical invasions of property.<sup>79</sup> If a regulation diminished the value of property, or even rendered it valueless, there was no “taking.”<sup>80</sup>

Perhaps this account of the original understanding is not correct. Here again, however, Justice Scalia did not explore history. Instead he spoke in purely theoretical terms — some combination of rough-and-ready economic analysis and moral theory. From the standpoint of a landowner, “total deprivation of beneficial use” might be “the equivalent of a physical appropriation.”<sup>81</sup> When property is rendered valueless, “it is less realistic to indulge our usual assumption” that government is simply adjusting economic benefits and burdens in a way “that secures an ‘average reciprocity of advantage’ to everyone concerned.”<sup>82</sup> And when the owner of land loses “economically beneficial or productive options for its use,” there is “a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”<sup>83</sup>

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<sup>77</sup> 505 U.S. 1003 (1992).

<sup>78</sup> *Id.* at 1026.

<sup>79</sup> See John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287 (2004); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000). It is true that Hart’s work explores the Fifth Amendment, not the Fourteenth, which was at issue in *Lucas*. Perhaps the Fourteenth Amendment, as originally understood, included a more expansive understanding of takings than did the Fifth. My point is not to reject that possibility, but to suggest that *Lucas* does not grapple with the historical materials.

<sup>80</sup> See sources cited *supra* note 79.

<sup>81</sup> *Lucas*, 505 U.S. at 1017.

<sup>82</sup> *Id.* at 1017–18 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>83</sup> *Id.* at 1018.

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That's not bad at all. In fact it's awfully good. And Justice Scalia's *Lucas* opinion has much more to say — about how to understand the distinction between prevention of harmful use (which is legitimate) and forced conferral of benefits (which is not),<sup>84</sup> about how to understand landowner's expectations,<sup>85</sup> and about the multiple ingredients of the "total taking" inquiry — which include:

[A]mong other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.<sup>86</sup>

Much of his analysis goes beyond the question of total takings to set out some of the foundations of takings law more generally.

*Lucas* is an excellent illustration of living constitutionalism. It counts as such not merely because it specified, through subsidiary tests, the meaning of a constitutional phrase that requires doctrinal elaboration. Far more interestingly, it counts as such because it did not attend to, and arguably abandoned, the original understanding of the constitutional provision in question.

Justice Scalia did not succeed in producing a *Lujan* or *Lucas* for affirmative action, but it was hardly for want of trying. In his view, the founding document requires the government to be color blind, for "under our Constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual . . . . In the eyes of government, we are just one race here. It is American."<sup>87</sup>

That's eloquent, but it's not at all clear that originalism would get you there. When Justice Scalia wrote these words, he was addressing a practice of the federal government, which was to give a preference to members of specified minority groups in awarding federal contracts. The only applicable provision of the Constitution was the Fifth Amendment's Due Process Clause. Justice Scalia was a critic of the whole idea of "substantive due process," and it would be impossible to argue that under the original understanding of the Fifth Amendment, the national government was forbidden to discriminate on the basis of race. The idea that the Constitution focuses "upon the individual," or that "we are just one race here," is living constitutionalism in undiluted form.

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<sup>84</sup> *Id.* at 1026.

<sup>85</sup> *Id.* at 1017 n.7.

<sup>86</sup> *Id.* at 1030–31 (citations omitted).

<sup>87</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

To be sure, many of the leading affirmative action cases involve the Equal Protection Clause, and in such cases, Justice Scalia could invoke a principle of equality: “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”<sup>88</sup> An uncompromising originalist would insist that whether the Equal Protection Clause proscribes any such discrimination depends on the original public understanding. A great deal of historical work suggests that the clause does no such thing (at least if we understand originalism in Justice Scalia’s preferred way). For one thing, the Freedman’s Bureau, which was up and running in the same period in which the Fourteenth Amendment was ratified, engaged in race-conscious actions designed to help the newly freed slaves, and there is a good argument that the debates, in the period, covered the same topics as contemporary debates about affirmative action — and they came out in favor of that practice.<sup>89</sup> For another thing, the Equal Protection Clause guarantees equal “protection,” not equality in general, and there is a fully plausible historical argument that the idea of “protection” is relatively narrow — and that it would not forbid discrimination in the domain of education at all.<sup>90</sup>

My goal here is not to take a stand on the historical debates. The puzzle is that with respect to one of the largest constitutional controversies of our time, Justice Scalia produced what is probably best taken as a moral reading of constitutional provisions — that is, a reading that was faithful to the text, and also to the precedents, but that also attempted to cast those provisions in (what seemed to him to be) the most attractive moral light.<sup>91</sup> That is exactly what he did in both *Lujan* and *Lucas*.

It must be acknowledged that in terms of moving the Court in his preferred direction, Justice Scalia’s greatest methodological triumph was his Second Amendment opinion in *District of Columbia v. Heller*.<sup>92</sup> In that opinion, he spoke in unambiguously originalist terms, carefully exploring the original public meaning. But it is tempting to

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<sup>88</sup> *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part).

<sup>89</sup> See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

<sup>90</sup> John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws”*, 50 COLUM. L. REV. 131 (1950).

<sup>91</sup> See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). I am urging, in short, that in important cases (certainly not always), Scalia was very much a Dworkinian. And while I am highlighting a few examples here, there are many others. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a ban on flagburning, without investigating original meaning of the First Amendment; Justice Scalia joined the majority); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (striking down restriction on commercial advertising, without addressing history; Justice Scalia joined the majority).

<sup>92</sup> 554 U.S. 570 (2008).

see *Heller* itself as an example of living constitutionalism. One reason is Justice Scalia's rejection of "the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment."<sup>93</sup> In his account, "[w]e do not interpret constitutional rights that way," as reflected in the fact that "the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search."<sup>94</sup> So too, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."<sup>95</sup>

Some originalists might want to cry out: Not so fast! The question is whether the original public meaning of the Second Amendment included "all instruments that constitute bearable arms," even if they were unfamiliar at the time of ratification. Very possibly so. But when Justice Scalia wrote, "[w]e do not interpret constitutional rights that way," and makes no historical argument, he sounds like a moral reader of the founding document, and it is not unreasonable to wonder whether he has abandoned originalism in favor of (a modest form of) living constitutionalism.

But there is a more fundamental point. *Heller* was decided in 2008, in a period in which the United States, or large segments of it, had converged on a strong commitment to the view that the Second Amendment protects an individual right to possess guns.<sup>96</sup> The historical materials are ambiguous, and prominent historians, specialists in the founding era, think that on the original meaning, *Heller* was wrong.<sup>97</sup> Even if it was, there are powerful moral and cultural arguments on its behalf. By 2008, a Supreme Court that rejected an individual right to possess guns would be rejecting a moral commitment that has become defining for many millions of Americans. *Heller* was written in mostly originalist terms, but as the Court's first recognition of the individual right to bear arms (217 years after the founding), it can easily be seen as a not-so-distant cousin to *Brown v. Board of Education*.

I do not mean to insist on that analogy. Justice Scalia's opinions in *Lujan*, *Lucas*, and the affirmative action cases are far more unambigu-

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<sup>93</sup> *Id.* at 582.

<sup>94</sup> *Id.* (citations omitted).

<sup>95</sup> *Id.*

<sup>96</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>97</sup> See SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103 (2000). An excellent, balanced discussion is MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* (2007).

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ous rejections of originalism. But those opinions are fundamental parts of his legacy. How did that happen?

One answer involves precedent. About a decade ago, I found myself in a relatively small group of people, speaking with Justice Scalia about constitutional law. One of them asked about *Lucas* — and suggested that it did not fit with the historical materials, which (the questioner said) strongly indicated that the Takings Clause was limited to physical invasions. Justice Scalia displayed some familiarity with those materials, and said something like this: “I’m an originalist, but I’m not crazy. I follow established precedents.” And then he paused for effect and added, with his characteristic twinkle: “And sometimes, when I follow precedents, it pleases me.”

Another answer cuts deeper. Justice Hugo Black was in many ways Justice Scalia’s closest predecessor. Justice Black also appealed to text and history; he wrote as an originalist. He also claimed to be a free speech absolutist, insisting that “no law abridging” means “no law abridging.”<sup>98</sup> No one disagrees that that is exactly what those words mean. But what’s that?

Justice Black was hardly unaffected by his belief “that our Constitution, with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere.”<sup>99</sup> I’m not at all sure about the word “absolute,” but it’s hard to resist Justice Black’s music. He was speaking less for Alexander Hamilton and James Madison than for what he saw as the hard-won wisdom of a nation that had lived through World War II and the McCarthy era — and that was on the cusp of the civil rights revolution. Justice Black cared about text and history, to be sure, but he was also a moral reader, and his Constitution was living. In some respects, Justice Scalia was similar.

I end with some personal words, which may, I think, cast light on the paradox that lies at the heart of this essay. When Justice Breyer was sworn in as an Associate Justice at a White House ceremony in 1994, Justice Scalia came up to me, put his arm around my shoulder, and said with a bright, mischievous smile, “First Ruth, and now Steve? Cass, it’s ALMOST enough to make me vote Democrat!”

Justice Scalia was witty, warm, funny, kind, capacious, and full of life. To know him was to love him. He was not only one of the most important Justices in the nation’s history; he was also among the best. Part of his greatness consisted in his abiding commitments — above all to the rule of law, but also to what he associated with it: clear writ-

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<sup>98</sup> See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); see also ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 491 (1997).

<sup>99</sup> Black, *supra* note 98, at 879.

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ing, analytical discipline, textualism, and originalism. But part of his greatness consisted in his understanding of the complexity of legal life, in his appreciation of reasonable disagreement, and in his ability, on important occasions, to speak to, and to make common cause with, people who did not see things as he did.

If the greatest defender of originalism was also a practitioner of living constitutionalism, it was because he was so large. He contained multitudes.<sup>100</sup>

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<sup>100</sup> The reference is to Walt Whitman:  
Do I contradict myself?  
Very well then I contradict myself,  
(I am large, I contain multitudes.)

WALT WHITMAN, *LEAVES OF GRASS* 246 (Library of Am. 1992) (1891–92).